Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1993

GARY G. GRAHAM and CHRISTOPHER LITRAS
Petitioners

v.

ROBERT A. BUTTERWORTH, State of Florida Attorney General, and BRADLEY E. KING, State Attorney for the Fifth Judicial Circuit
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. Whether government officials, who have issued an official opinion that a judicial candidate's political speech has violated state law, can moot subsequently filed litigation by the candidate and his supporter challenging the constitutionality of the state statute on First Amendment grounds, simply by changing their interpretation of the questioned statute and promising not to prosecute?

2. Whether the decision below -- that a prosecutor's assurances to exclude the petitioners' political speech from the coverage of a challenged statute mooted the case -- directly conflicts with well established Supreme Court mootness jurisprudence?

3. Whether the decision below -- that a party has no "overbreadth" standing to challenge a statute unless the statute regulates plaintiffs' speech -- is incorrect and contrary to Supreme Court jurisprudence governing constitutional "overbreadth" challenges?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioners, Gary G. Graham and Christopher Litras, and respondents Robert A. Butterworth, Attorney General of the State of Florida, and Bradley E. King, State Attorney for the Fifth Judicial Circuit of Florida. The same parties are before this Court. There are no parties to this action within the scope of Supreme Court Rule 29.1.

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GARY G. GRAHAM and CHRISTOPHER LITRAS
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Petitioners, Gary G. Graham and Christopher Litras, respectfully petition this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this civil proceeding on October 25, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 5 F.3d 496 and is reprinted in the Appendix at 1a. The denial of petitioners' petition for rehearing and suggestion for rehearing *en banc* by the United States Court of Appeals for the Eleventh Circuit is reported at 14 F.3d 60 (table) and is reprinted in the Appendix at 20a.

The district court opinion and order denying petitioners' motion for summary judgment and granting respondents' cross-motion are unpublished and are reprinted in the Appendix at 10a.

JURISDICTION

This action, brought pursuant to 42 U.S.C. § 1983, is within federal court subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

The United States District Court for the Middle District of Florida entered final judgment on October 6, 1992, and petitioners timely invoked the appellate jurisdiction of court of appeals, 28 U.S.C. § 1291, by filing their notice of appeal on November 3, 1992.

The Eleventh Circuit, on October 25, 1993, entered judgment dismissing petitioners' action as moot. Appendix 1a. However, petitioners timely filed their petition for rehearing and suggestion for rehearing *en banc* on November 9, 1993, within the 21 days allowed by Eleventh Circuit Rule 40-2. The Eleventh Circuit denied this petition and suggestion on January 14, 1994. Appendix 20a.

Petitioners now invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), by filing this petition within the ninety day time period provided by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case implicates Amendment I of the United States Constitution. This case also implicates Fl. Stat. §§ 105.071(11) and 104.43. The full text of these provisions is reprinted in Appendix at 22a.

STATEMENT OF THE CASE

Petitioners Gary Graham, then a County Court Judge for Citrus County, Florida, and Christopher Litras, a registered voter and a supporter of Graham for reelection, commenced this action in the Middle District of Florida on March 16, 1992, pursuant to 42 U.S.C. § 1983. They sought declaratory and injunctive relief against the enforcement of Fla. Stat. § 105.071(11), which prohibits judicial candidates from paying for certain political advertisements.

On July 20, 1992, the parties filed cross motions for summary judgment. On October 6, 1992, the district court denied petitioners' motion and granted respondents'. On November 3, 1992, petitioners timely appealed to the United States Court of Appeals for the Eleventh Circuit. A panel of that court, consisting of Judges Hatchett, Fay, and Johnson, heard oral argument on August 31, 1993. It dismissed the appeal for mootness on October 25, 1993. It also found that petitioners had no standing to raise an overbreadth challenge. Petitioners' petition for rehearing and suggestion for rehearing *en banc* was denied on January 14, 1994. Petitioners now seek review by this Court.

The substantive facts are undisputed. In 1990, Graham was a candidate for reelection to the office of County Court Judge for Citrus County, Florida. Litras, a citizen and registered voter in Citrus County, supported Graham's candidacy. As part of his campaign, Graham paid for the printing of 5,000 postcards reading: "I am supporting Judge Graham because:_____." The space provided allowed the recipient to write his or her reasons for supporting Graham's candidacy. During the period from August 1 to August 20, 1990, Graham, Litras and others distributed 50 to 100 such postcards to voters.

Additionally, Graham received unsolicited letters of support from voters within his judicial district. With the written permission of the authors of these letters, Graham had some of them reprinted as part of his paid political newspaper advertisements.

During the 1990 campaign, Charles P. Horn, Graham's opponent, publicly accused Graham of violating Fla. Stat. § 105.071(11), reprinted in the Appendix at 23a-24a, which prohibits judicial candidates from agreeing to paying for "all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed . . . by any such person, group, or organization." Horn asserted that the postcards and the published letters of support violated the statute.

Graham then spoke with Ric Ridgeway, State Attorney King's Chief Assistant, who told Graham that the statute's meaning was unclear and that Graham would have to proceed at his own risk. Horn subsequently wrote State Attorney King concerning Graham's alleged violations. After discussions

between Graham and King, King informed Horn by letter that the postcards and the reprinting of the letters violated the statute. However, King also added that he would take no further action unless Horn demanded a grand jury investigation pursuant to Fla. Stat. § 104.43,[1] because his investigation found no criminal intent. Horn replied that he did not want a grand jury investigation, so King took no further action.

In November, 1990, Graham was reelected. He and Litras then brought this lawsuit challenging the constitutionality of Fla. Stat. § 105.071(11). After the commencement of this litigation, *for the first time*, in an obvious attempt to avoid a ruling on this Constitutional challenge, respondents changed their position concerning the scope of the Florida statute. Notwithstanding King's prior official interpretation that the postcards and newspaper advertisements violated Fla. Stat. § 105.071(11), respondents have defended this litigation based on their new position (without any authoritative ruling from the Florida courts) that the statute does not govern the petitioners' postcards and advertisements.

The United States District Court for the Middle District of Florida found that Graham had no standing to challenge Fla. Stat. § 105.071(11) and refused to reach Graham's constitutional challenges. On appeal, the United States Court of Appeals for the Eleventh Circuit found that

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[1]Fla. Stat § 104.43, reprinted at 22a, authorizes any registered voter or candidate to demand a grand jury investigation. Upon such a demand, the State Attorney has no discretion to refuse to present the matter to the Grand Jury.

Graham and Litras had standing, but not "overbreadth" standing, to challenge the Florida statute facially. Furthermore, the court held that the prosecutor's change in position had mooted their case.

Graham intends to run for office again and Litras intends to support him. Graham and Litras intend to distribute the postcards and reprint unsolicited letters of support in local newspapers as they did in the election that led to this litigation. In light of Fla. Stat. § 104.43, the wording of the statute, and King's original interpretation of the statute, petitioners fear prosecution as a result of their advertisements.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision -- That the Prosecutor Has Mooted the Case by Post-Litigation Promises to Exclude Petitioners' Political Speech From the Coverage of the Challenged Statute -- Directly Conflicts With Established Supreme Court Jurisprudence and Serves to Immunize Government Actions From Constitutional Scrutiny

The United States Court of Appeals for the Eleventh Circuit determined that petitioners Graham and Litras had standing to challenge Fla. Stat. § 105.071(11), because Graham was threatened with prosecution under the statute. Appendix 5a-6a. Nonetheless, the court found that the respondents had successfully mooted the case by promising, after this law suit had been filed, not to prosecute and by changing their interpretation of the statute to exclude petitioner's political advertisements. Appendix 7a-9a. The

court reasoned that since respondents had withdrawn their original determination and had informed the petitioners that the proposed advertising campaign fell outside the scope of the statute, respondents could not "seek prosecution against" the petitioners" and "no possibility exists that the [respondents] will seek to enforce the challenged statute. . . ." *Id.* at 7a.

The Eleventh Circuit's decision is contrary to this Court's relevant jurisprudence and it establishes a dangerous exception to the mootness doctrine in First Amendment free speech cases. This Court consistently has recognized that a government defendant cannot moot a pending Constitutional challenge either by changing its interpretation of the statute or by promising not to prosecute. *See, e.g., Northeastern Florida General Contractors v. City of Jacksonville*, __ U.S. __, 113 S.Ct. 2297, 2301 (1993); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Long ago, this Court held that "voluntary cessation of allegedly illegal conduct ... does not make the case moot," and "a dispute over the legality of the challenged practices ... may remain to be settled in such circumstances." *W.T. Grant*, 345 U.S. at 632. A defendant's freedom to return to his old ways, along with the public interest in settling the legality of the questioned practice, "[militate] against a mootness conclusion." *Id.* Thus, defendants bear a "heavy burden" of showing "'no reasonable expectation that the wrong will be repeated.'" *Id.* at 633, *quoting United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945).

In *City of Mesquite*, this Court reaffirmed the well-established rule of *W.T. Grant* that the "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289. Furthermore, this Court recently applied the "well settled" rule of *City of Mesquite* to a constitutional challenge of a minority "set-aside" statute in *Northeastern Florida General Contractors*, 113 S. Ct. at 2301. There, this Court held that even an outright elimination of the challenged statutory language will not moot a pending challenge to it. *Id.*

For the voluntary cessation of official conduct to moot a case, two conditions must be met. First, there must be "*no reasonable expectation*" that the wrong would be repeated and second, "interim relief or events [must] have *completely and irrevocably* eradicated the effects of the alleged actions." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted) (emphasis supplied). Citing *W.T. Grant* at 632-33, this Court held that the burden of the moving party (*i.e.*, the party contending that the case is moot) remains a "heavy one." *Davis*, 440 U.S. at 631.

Recent circuit court decisions have underscored the concerns evinced by this Court in *W.T. Grant* and subsequent cases. In *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), the Seventh Circuit refused to treat as moot a challenge to an Illinois abortion law that had been amended during the pendency of the case's appeal. 749 F.2d at 458. That court, relying on this Court's mootness cases, held that "*eradication*" of "chilling effects caused by [the challenged statute]" is a "*prerequisite to mootness*." *Id.* (emphasis supplied).

The Tenth Circuit in *Longstreth v. Maynard*, 961 F.2d 895 (10th Cir. 1992), similarly held that the revision of a challenged Oklahoma Department of Corrections' policy during appeal did not moot the case because the court did "not feel it [had been] shown to be *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." 951 F.2d at 900-901 (emphasis supplied). The court cited *City of Mesquite*'s "well settled" holding that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." 961 F.2d at 901, *citing City of Mesquite*, 455 U.S. at 289.

Even a district court's approval of amendments to a challenged county ordinance has been held not to moot a challenge to the ordinance. *Coral Construction Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991). Furthermore, a challenged statute lapsing from passage of time does not moot a case if "the law has not changed because of an amendment, but lies dormant, ready to be brought back to life if the need for it reoccurs." *Leonardson v. City of East Lansing*, 896 F.2d 190, 194 (6th Cir. 1990).

Before this case, the Eleventh Circuit had recognized the well established rule of *City of Mesquite*. *See, e.g., ACLU v. The Florida Bar*, 999 F.2d 1486, 1495-96 (11th Cir. 1993); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 and n.5 (11th Cir. 1993); *Solomon v. City of Gainesville*, 763 F.2d 1212, 1213 and n.1 (11th Cir 1985). It previously had determined that a city official's promise to discontinue prosecutorial action against a business allegedly in violation of a city ordinance failed to moot a case. *Solomon*, 763 F.2d at 1213 n.1.

However, in the instant case, the Eleventh Circuit, in a published decision, has created a dangerous exception to established First Amendment jurisprudence by allowing a prosecutor, *at will*, to stifle a First Amendment challenge to an overbroad and oppressive statute simply by changing his interpretation of the statute during any subsequent litigation. The Eleventh Circuit's suggestion that "no possibility exists" that respondents will enforce the statute is incorrect. There has been no trial or finding of fact or law on this issue. The lower court's conclusion that the respondents "cannot seek prosecution against" the petitioners (Appendix 7a) is directly contradicted by Fla. Stat. § 104.43, *see* Appendix, 22a, which *requires* a grand jury investigation into an alleged violation of the election code, such as the one at issue, simply upon request by a candidate or voter.

Because the respondents are without discretion and *must* initiate a grand jury investigation at the request of any candidate or voter, the court's "impossibility" finding is mistaken. By virtue of Fla. Stat. § 104.43 alone, the threat of prosecution continues to weigh heavily on Graham and other judicial candidates and has a chilling effect on their right to free speech as protected by the First Amendment. Furthermore, nothing binds the respondents to honor their promise. The Florida Attorney General or State Attorney could at any time and with impunity decide to bring up charges against Graham or any other judicial candidate, even during an election campaign, when such action would be the most damaging, notwithstanding the respondents' contrary suggestion.

Thus, petitioners have a reasonable expectation that the threat of prosecution could quite easily be repeated. The

prosecutor's arbitrary reinterpretation of the statute -- after the commencement of this litigation -- cannot moot this case. *See Davis*, 440 U.S. at 631. Fla. Stat. § 105.071(11) remains completely unaltered and, especially in light of Fla. Stat. § 104.43, poses a threat to the First Amendment rights of the petitioners and others. Even if respondents do not prosecute petitioners, the statute's chilling effect upon Graham and any other judicial candidates remains, requiring all candidates to limit the scope of their campaign speech. The threat of prosecution is by no means "impossible." The prosecutor's actions have not mooted this political speech case.

More importantly, the Eleventh Circuit's ruling has a damaging impact far beyond this case. The exercise of all fundamental constitutional rights -- even beyond those involving crucial First Amendment political speech -- is threatened if government authorities can moot constitutional litigation at will simply by changing their interpretation of a challenged statute's scope every time a constitutional challenge is filed. In effect, the ruling below can be relied upon to immunize from judicial scrutiny all governmental conduct threatening core, fundamental rights. Under the Eleventh Circuit's decision, the challenge to the governmental conduct and the underlying statute is "mooted" whenever a government official, after using the challenged statute to disparage or deter a candidate, conveniently changes his or her statutory interpretation once a suit is filed challenging the statute. Similarly, under the Eleventh Circuit's decision, a challenge to a statute restricting abortions easily could be mooted by state officials who -- after threatening prosecution -- change their interpretation of the statute when a litigant files suit challenging the statute. Challenges to statutes creating classifications based on alienage, gender, or race, likewise

could be easily mooted by interpretations of convenience proffered after a litigant files suit challenging the statute. Thus, the Eleventh Circuit's decision immunizes a wide range of harassing governmental conduct from judicial scrutiny.

This Court has never granted governmental entities the authority to moot constitutional challenges to statutes simply by tendering a subsequent interpretation as a "defense" to a constitutional lawsuit. Nor has this Court ever authorized officials to immunize their threats under questionable statutes from constitutional scrutiny by subsequent promises not to prosecute. Yet, the Eleventh Circuit's decision publicly authorizes both. This Court should grant a writ of certiorari to consider the Eleventh Circuit's dangerous precedent.

II. The Eleventh Circuit's Ruling That Petitioners Have No "Overbreadth" Standing, Because Fla. Stat. § 105.071(11) Does Not Regulate Their Conduct, Conflicts with This Court's First Amendment Overbreadth Jurisprudence

Petitioners facially challenged Fla. Stat § 105.071(11) on overbreadth grounds. However, in addition to ruling that the prosecutor's change of statutory interpretation of Fla. Stat. § 105.071(11) mooted this case, the Eleventh Circuit also concluded that the petitioners did not have standing to raise a facial overbreadth challenge to Fla. Stat. § 105.071(11). The Eleventh Circuit reasoned: "Because the challenged statute does not regulate the conduct that the [petitioners] intend to engage in, they do not have standing to raise an overbreadth challenge to the statute." Appendix, 9a n.3. This finding, in addition to evidencing a misunderstanding of the scope of the

challenged statute, directly contradicts all binding Supreme Court jurisprudence defining the "overbreadth" doctrine.

This Court has emphasized that "[s]peech on public issues occupies the 'highest rung of hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983), *citing NAACP v. Claiborne Hardware Co.*, 458 886 (1982). In furtherance of this fundamental right, this Court consistently has upheld plaintiff's standing to challenge a statute on First Amendment grounds, even where plaintiff's conduct falls outside the ambit of the statute. *See, e.g., Board of Trustees v. Fox*, 492 U.S. 469, 484 (1989); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Lovell v. Griffin*, 303 U.S. 444, 450-52 (1938). Thus, a plaintiff can raise the rights of others not before the court who will be affected by the statute where the Constitutional challenge is based on the First Amendment. *Virginia v. American Booksellers*, 484 U.S. 383, 392-93. A plaintiff need not qualify as a member of the injured class. *Id.*

Furthermore, this Court has established that persons subject to the statute may urge the Constitutional rights of others not appearing before the court. *Massachusetts v. Oakes*, 491 U.S. 576 (1989). First Amendment overbreadth "is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Id.* at 581. "[A] judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or

expression" and not the litigant's "own rights of free expression" permits challenge to a statute. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This rule clearly applies in the instant case, where others, such as voters, who are directly affected by statute (which regulates the campaign speech they receive), do not have the time, tenacity, or money to pursue arduous constitutional litigation.

As the Eleventh Circuit's opinion acknowledges, Graham and Litras challenged the Florida statute *facially*. *See* Appendix at 9a, n.3. Yet, that court denied them overbreadth standing. The effect of the Eleventh Circuit's ruling is to substantially undermine facial overbreadth challenges in First Amendment cases. By requiring that the challenging party's speech, conduct, or activities be directly within the scope of -- and currently in violation of -- the challenged statute, the Eleventh Circuit erroneously has equated the "overbreadth" standing doctrine with "as applied" standing, to the detriment of the First Amendment.

Furthermore, this Court has analyzed First Amendment overbreadth standing to challenge a statute on its face in light of the statutory interpretation proffered by the plaintiff. *See generally, American Booksellers*, 484 U.S. at 392-93. However, under the Eleventh Circuit's decision, the prosecutor's *current* interpretation governs. Members of the public-at-large are no longer at liberty to challenge the constitutionality of statutes regulating core First Amendment speech unless their speech also happen to be undisputedly within that prohibited by the statute -- as "currently" interpreted by the prosecutor. However, as this case illustrates, "overbroad" statutes frequently are "vague" statutes, and what is deemed to fall within their ambit is often

delineated by little more than executive or prosecutorial opinion, subject to change at the prosecutor's whim.

Overbreadth standing should not depend on the government's opinion regarding whether a plaintiff's speech is within the scope of a challenged statute. Indeed, the purpose of the doctrine is to protect against the exact arbitrary official action that the Eleventh Circuit has sanctioned in this case. Yet, the Eleventh Circuit's ruling has subverted this First Amendment doctrine. When the government opines that the conduct in question is within the scope of the statute, the plaintiff has standing. However, as here, where the government changes its mind and determines that the speech in question falls outside the statute, the plaintiff loses his standing. Thus, the purpose of the doctrine -- to protect against the "chilling effect" of overbroad statutes aimed at curbing the exercise of First Amendment rights -- is undermined to the detriment of the core protections afforded by the First Amendment.

The ruling in this case illustrates the potentially broad impact of the Eleventh Circuit's decision on subsequent cases. Graham, as a person who intends to run for judicial office, and Litras, as a Graham supporter, clearly are persons governed by the challenged restrictions of Fla. Stat. § 105.071(11), especially since they had been informed by respondent King that their advertisements violated the statute. Nevertheless, the Eleventh Circuit has deprived them of this standing based upon the prosecutor's newly (and conveniently) found opinion that their political advertisements did not violate the statute. Thus, under the decision below, even those who are officially accused of violating a statute can be deprived of "overbreadth" standing to challenge it.

Under this Court's overbreadth jurisprudence, even if petitioners' advertisements did not violate the statute, Graham and Litras still would have overbreadth standing to challenge it, because they were persons who were *governed* by it. *See, e.g., Fox*, 492 U.S. at 484; *American Booksellers*, 484 U.S. at 392-93; *Village of Schaumberg*, 444 U.S. at 634; *Grayned*, 408 U.S. at 114; *Thornhill*, 310 U.S. at 96; *Lovell*, 303 U.S. at 452. That statute plainly *governs* all political advertisements in all judicial campaigns, including the advertisements used by Graham and Litras. Not only does this broadly worded statute prohibit the types of political advertisement involved herein, it also potentially prohibits a broad array of political advertisements. The terms of Fla. Stat. § 105.071(11), given their plain meaning, prohibit almost all (if not all) advertisements in judicial campaigns.[2] As a

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[2] The statute forbids judicial candidates to pay for "advertisements," "sponsored by any person, group or organization" which contain an endorsement of the judicial candidate. Webster's College Dictionary (Random House, 1991) defines "sponsor" as "one who vouches or is responsible for a person or thing." *Id.* at 1293. Thus, even if "sponsored by" is defined narrowly as "paid for" (as suggested by the district court), any judicial candidate (a "person"), upon "paying for" an advertisement that includes a third-party endorsement, would be a "sponsor" in violation of the statute's "plain language."

The "plain meaning" of the terms of the statute also would prohibit a judicial candidate from paying for and running a newspaper advertisement supporting and endorsing his or her own candidacy. Certainly, the candidate is a "person" who "sponsors" himself or herself through the advertisement paid for with his or her own money. Nothing

judicial candidate and a supporter subject to the regulation of the statute, petitioners certainly are appropriate persons to challenge its overbroad scope, even assuming arguendo that their advertisements did not violate the statute.

Yet, under the Eleventh Circuit's narrow interpretation of the overbreadth standing doctrine, Graham and Litras are precluded from challenging the broad impact of this statute, because the prosecutor has changed his mind and decided, *after this lawsuit was filed*, that their advertisements do not *violate* the statute. But, a *violation* has never been a mandatory predicate for overbreadth standing. Because Graham and Litras remain within the class of persons regulated by the statute (*i.e.*, Florida judicial candidates and their supporters), they have overbreadth standing to challenge it, whether or not the political advertisements at issue can be considered to be violative of the statute.

The Eleventh Circuit's ruling is dangerous, because it reduces the overbreadth standing doctrine, as well as the question of constitutional mootness, to the government's arbitrary opinion regarding what is within and what is without a statute's coverage. That interpretation conflicts with this Court's jurisprudence, to the prejudice of core First Amendment rights. This Court should grant petitioners'

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in the statute defines the judicial candidate himself as being outside the scope of class of "persons" "sponsor[ing]" a candidate under the statute. Thus, the statute potentially includes a full array of political advertisements beyond those involved in this case.

petition to consider the correctness of the Eleventh Circuit's ruling.

CONCLUSION

The Eleventh Circuit's decision conflicts with well-established Supreme Court jurisprudence governing mootness and overbreadth standing in First Amendment free speech challenges. Under this precedent, the potential for official infringement on the Constitutional rights of judicial candidates and the electorate is significant and real. Petitioners Graham and Litras respectfully request that the Court grant their petition and issue a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

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OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Hon. Gary G. **GRAHAM** and Christopher Litras, *Plaintiffs-Appellants*,

v.

Robert A. **BUTTERWORTH,** Bradley E. King, *Defendants-Appellees*.

No. 92-3115.
United States Court of Appeals,
Eleventh Circuit.
Oct. 25, 1993.
(Reported at 5 F.3d 496)

Before FAY and HATCHETT, Circuit Judges, and JOHNSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

Because events subsequent to the filing of this lawsuit have rendered it moot, we dismiss this appeal.

I. FACTS

In 1990, Gary Graham was a candidate for the office of county court judge for Citrus County, Florida, and Christopher Litras, a resident of Citrus County, supported Graham in his campaign. As part of his campaign literature, Graham paid for the printing of 5,000 postcards reading: "I am supporting Judge Graham because: _____." The blank space allowed supporters to insert reasons for supporting

Graham. Supporters would then mail the postcards to other voters to inform them of Graham's campaign. Each postcard stated: "Paid for by the campaign account of Gary Graham," denoting that it was a paid political advertisement. Graham, Litras, and other supporters distributed approximately 50 to 100 of these postcards in Citrus County.

During the campaign, Graham also received a number of unsolicited letters from area voters. With the written consent of the voters, Graham paid to have some of their letters reprinted in local newspapers as part of an advertisement for Graham's candidacy. Each advertisement stated: "Paid for by campaign account for Gary Graham," indicating that it was a paid political advertisement.

During the campaign in August of 1990, Charles Horn, Graham's opponent, publicly accused Graham of violating Florida Statute § 105.071(11). Florida Statute § 105.071(11) reads: "A candidate for judicial office shall not: ... (11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization."

On August 27, 1990, Bradley King, State Attorney for the Fifth Judicial Circuit, which includes Citrus County, informed Graham that the distribution of the postcards and the publication of the letters of support violated the statute. Because the state attorney concluded that Graham did not have the requisite criminal intent to violate the statute, and Graham's opponent did not wish to have the grand jury investigate the incident, the state attorney took no further action.

Graham won the election for county court judge for Citrus County in 1990 and now states that he intends to seek reelection in 1994.[1] Litras states that he intends to support Graham's reelection bid. Graham also states that he intends to use similar advertising in the form of postcards and advertisements displaying unsolicited letters of support when he seeks reelection.

II. PROCEDURAL HISTORY

On March 16, 1992, Graham and Litras, collectively appellants, filed this lawsuit against Robert Butterworth, State of Florida Attorney General, and Bradley King, seeking declaratory and injunctive relief against enforcement of Florida Statute § 105.071(11). Butterworth and King, collectively appellees, filed a motion to dismiss, which the district court denied on June 26, 1992. On July 20, 1992, both parties filed cross motions for summary judgment. On October 6, 1992, the district court denied the appellants' motion for summary judgment and granted the appellees' motion for summary judgment, finding that the statute did not proscribe the appellants' intended conduct; thus, no actual threat of injury existed, and therefore, no "case or controversy" existed. The appellants brought this appeal.

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[1]After the district court's order issued on October 6, 1992, the Florida Supreme Court removed Graham from judicial office on June 24, 1993. *Inquiry Concerning a Judge, Re: Graham*, 620 So.2d 1273 (Fla. 1993).

III. CONTENTIONS OF THE PARTIES

The appellants contend that they have "standing" to challenge the statute because an opponent accused Graham of violating the statute, and the state attorney informed Graham that this conduct violated the statute; thus, the appellants were threatened with prosecution. The appellants also contend that the fact that the appellees have indicated that they will not prosecute does not divest standing because a future prosecutor remains free to prosecute the appellants or other judicial candidates under the statute. Moreover, the appellants argue that they have standing to challenge the statute under any circumstance because it is overbroad and has a chilling effect on political speech.

The appellees contend that the appellants' prior conduct did not violate the statute, and the appellants failed to show that they suffered an actual injury. Additionally, the appellees argue that the appellants cannot show that they are about to engage in conduct that the statute prohibits. Moreover, the appellees argue that the appellants' fear of the threat of prosecution is misplaced because the statute does not apply to their prior or intended conduct; thus, the appellees have continuously maintained that they cannot prosecute the appellants.

IV. ISSUE

We must decide whether the appellants have standing to challenge Florida Statute § 105.071(11), and if so, whether subsequent developments have rendered this case moot.

V. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment. *Key West Harbour Development Corp. v. City of Key West, Florida*, 987 F.2d 723, 726 (11th Cir. 1993).

VI. DISCUSSION

Article III of the United States Constitution requires that federal courts address only "cases and controversies." *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968). The case and controversy doctrine places a dual limitation upon federal courts which is termed "justiciability." *Flast*, 392 U.S. at 95, 88 S.Ct. at 1950. Justiciability, then, seeks to ensure that federal courts address only questions presented in an adversarial context and that the judiciary will not encroach upon the powers of other branches of government. *Flast*, 392 U.S. at 94-95, 88 S.Ct. at 1949-50. "Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *Flast*, 392 U.S. at 95, 88 S.Ct. at 1950.

A. Standing

Before a federal court may address the merits of a legal claim, the litigants must establish standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149, 154, 110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990). Although the person challenging the statute does not have to await threatened injury to obtain relief, a plaintiff who challenges a statute must

demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)). Thus, an appropriate plaintiff is one who has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution," not one who simply has "imaginary or speculative" fears of state prosecution. *Babbitt*, 442 U.S. at 298, 99 S.Ct. at 2308. With the principles of standing set forth, we now seek to determine whether the appellants had standing to challenge the statute.

At the time the appellants filed this action, Graham was a judicial candidate, a county court judge for Citrus County intending to seek reelection in 1994. During the prior campaign in 1990, the appellants engaged in arguably protected political conduct, and the state attorney advised Graham that the statute prohibited this campaign conduct. The state attorney declined to prosecute, however, because he believed that Graham lacked the criminal intent to violate the statute, and Graham's opponent did not seek a grand jury investigation. Nevertheless, at the time the appellants filed this action, a credible threat of prosecution existed because they intended to engage in arguably protected conduct, which the statute seemed to proscribe. *See ACLU*, 999 F.2d at 1492 (stating that a plaintiff must allege that he was threatened with prosecution, prosecution is likely, or a credible threat of prosecution exists). Hence, we hold that at the time the appellants filed this action, they had standing to challenge the statute.

B. Mootness

Although the appellants had standing when they filed this lawsuit, subsequent developments have rendered this case moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969).

After the appellants filed this lawsuit, the appellees withdrew their initial determination that the appellants' conduct violated the statute, and also informed the appellants that their intended campaign conduct would not fall within the ambit of the statute.[2] Thus, the appellees cannot seek prosecution against the appellants or other judicial candidates engaging in similar campaign conduct. Clearly, then, no possibility exists that the appellees will seek to enforce the challenged statute against the appellants or other judicial candidates intending to distribute postcards or print unsolicited letters of support of the type involved in this case in the future. *See ACLU*, 999 F.2d at 1494 (stating that some possibility must exist that the defendants will seek to enforce the challenged regulation).

We are aware that ACLU reached a different result; however, it is distinguishable. In ACLU, a judicial candidate, Larry Schack, desired to speak openly about his opponent in

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[2]Specifically, in the appellees' Motion to Dismiss, Answer to Standard Interrogatories, Motion for Summary Judgment, appellees briefs, and during oral argument to this court, the appellees repeatedly represented that the appellants' proposed campaign conduct does not violate the statute.

his campaign speeches. Aware that other judicial candidates had violated the Florida Code of Judicial Conduct (Code), Schack requested an advisory opinion from the Committee on Standards of Conduct Governing Judges regarding whether his proposed speeches would violate the Code. The Committee advised Schack that Canon 7(B)(1)(a) of the Code prohibited his proposed campaign speeches. Schack then asked the Judicial Qualifications Commission (JQC) whether it would enforce the canon against him; it refused to reply. Thus, Schack, joined by the ACLU, sued the Florida Bar (Bar) and the JQC.

After Schack filed suit, the Bar and the JQC stated that the canon did not prohibit Schack from making his proposed campaign speeches and that they did not intend to enforce the canon against him. The Bar and the JQC maintained, however, that the canon was constitutional. The court found that a live controversy existed, even after the Bar and the JQC acquiesced to Schack's position, because the Bar and the JQC maintained that the challenged canon was constitutional and that Schack's proposed speech fell within the parameters of what the canon regulated, but that they would not enforce it against Schack in this case; thus, a possibility existed that the Bar and the JQC would seek to enforce the challenged regulation against Schack or other judicial candidates in the future. *ACLU*, 999 F.2d at 1494.

In this case, however, the appellees have repeatedly stated that the statute does not prohibit the appellants' proposed conduct of distributing postcards and publishing unsolicited letters of support of the type involved in this case; thus, the appellees cannot enforce this statute against the appellants or other judicial candidates engaging in the same

conduct because, unlike in *ACLU*, the appellants' proposed conduct does not fall within the parameters of what the statute seeks to regulate. Hence, we hold that the appellees' representation that the statute does not proscribe the appellants' proposed conduct renders this case moot.[3]

VII. CONCLUSION

We conclude that the appellants had standing to challenge the statute, but that the appellees' conduct after the appellants filed this lawsuit rendered this case moot. Accordingly, we dismiss this appeal.

DISMISSED.

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[3]Because the challenged statute does not regulate the conduct that the appellants intend to engage in, they do not have standing to raise an overbreadth challenge to the statute. *See Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993).

ORDER AND JUDGMENT OF THE DISTRICT COURT

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Clerk, U.S. District Court
Middle District of Fla.
... Florida

HON. GARY G. GRAHAM and
CHRISTOPHER LITRAS,
Plaintiffs,

v.

Case No.
92-53-Civ-Oc-16

ROBERT A. BUTTERWORTH, State of
Florida Attorney General, and
BRADLEY E. KING, State Attorney
for the Fifth Judicial Circuit,

Defendants.

ORDER

This cause is before the Court on Defendants' Motion for Summary Judgement (docket no. 19) and Plaintiffs' Motion for Summary Judgment (docket no. 21). Timely responses have been filed. Oral arguments were heard on Thursday, September 24, 1992.

STANDARD FOR SUMMARY JUDGMENT

Summary judgement is proper where, upon motion of a party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of demonstrating, by references to the record, that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Once the moving party has met its burden, the burden of production shifts to the non-moving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Summary judgment will be entered

> after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgement as a matter of law" because

> the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-32.

BACKGROUND FACTS

In this case the facts have been stipulated. In 1990, Plaintiff, the Honorable Gary Graham, was a candidate for the office of County Court Judge for Citrus County, Florida. Plaintiff Christopher Litras supported Judge Graham in his campaign. As part of his campaign, Judge Graham paid for the printing of postcards reading: "I am supporting Judge Graham because:_____." The space provided allowed the recipient to write his or her reasons for supporting Judge Graham in his election bid. Each postcard was clearly marked "paid for by the campaign account of Gary Graham," indicating it was a paid political advertisement. In printing these postcards, Judge Graham, would mail them to other voters as a means of informing them about Judge Graham's campaign. Plaintiffs and other supporters of Judge Graham distributed 50 to 100 postcards to voters in Citrus County.

During his campaign Judge Graham received a number of unsolicited letters of support from area voters. The express written consent of the letters' authors, Judge Graham paid to have some of the letters reprinted in local newspapers as part of an advertisement for Judge Graham's candidacy. Each advertisement indicated it was a paid political advertisement by clearly stating: "paid for by campaign account for Gray Graham." These advertisements appeared on 12 different

dates in the Citrus County Chronicle, the St. Petersburg times, and the Tampa Tribune.

During the course of the election, Charles P. Horn, Judge Graham's opponent, publicly accused Graham of violating Florida Statues § 105.071(11). After discussions of the matter between Judge Graham and Defendant Bradley King, King indicated the postcards and the printing of the letters of support violated the Florida statute. However, after King's investigation indicated there was no criminal intent on Judge Graham's part and Mr. Horn said he did not wish to have the grand jury investigate the incident, Mr. King took no further action.

Judge Graham was elected County Court Judge for Citrus County and now intends to seek reelection in 1994. Plaintiff Litras intends to support Judge Graham's reelection bid. Judge Graham intends to use advertising in the form of postcards and advertisements displaying unsolicited letters of support when he seeks reelection.

The statute in question reads:

> A candidate for judicial office shall not:
>
> * * *
>
> (11) Agree to pay all or any part of an advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization.

Fla. State. § 105.071(11). Plaintiffs claim the statute is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution and violates the Equal Protection Clause of The Fourteenth Amendment.

JUSTICIABILITY: IS THERE A "CASE OR CONTROVERSY?"

The Court must first determine whether it has jurisdiction in this case. The federal courts can exercise jurisdiction only in instances where there is an actual "case or controversy." U.S. Const. Art III, §2, cl. 1; Steffel v. Thompson, 415 U.S. 452, 458 (1974). A case or controversy" exists when the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." Babbit v. United Farm Workers National Union, 442 U.S. 289, 298 (1979)(citing Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945)). There must be an actual injury, one that is not hypothetical or imaginary, in order for a "case" to lie. "The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983).

A component of the "case or controversy" requirement is the doctrine of standing. The Court must determine if the Plaintiff is the proper party to bring the lawsuit. Flast v. Cohen, 392 U.S. 83, 99-100 (1968). The rationale behind the doctrine is to guarantee that the parties have "such a personal stake in he outcome of the controversy as to assure that

concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Article III requires that "[i]n order to establish they have standing to sue, plaintiffs must show they have suffered 'some actual or threatened injury' fairly traceable to the challenged conduct of the defendants that is likely to be redressed by a favorable decision." United Food and Commercial Workers International Union, AFL-CIO, CLC v. IBP, Inc., 857 F.2d 422, 426 (8th Cir. 1988)(citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

When it comes to challenging the constitutionality of a statute the requirement that the plaintiff suffer some personal injury is important to guarantee that the Court is not being asked to given an advisory opinion. However, Plaintiffs

> should not be required to expose themselves to prosecution to secure the desired relief as long as they have "alleged an intention to engage in a course of conduct arguable affected with a constitutional interest, proscribed by a statute, and there exists a credible threat of prosecution thereunder. . .."

Athens Lumber Co., Inc. v. Federal Election Com'n, 589 F.2d 1006, 1012 (11th Cir. 1982)(quoting Babbitt, 442 U.S. at 298). Nevertheless, these cases dealt with conduct actually prohibited by the statute in question. The threat of prosecution was real because the conduct was outlawed. If the conduct at issue is perfectly legal then the parties do not have adverse interest. Because the conduct at issue is not a

violation of Florida Statutes §105.071(11) there is no actual threat of injury and, therefore, no "case or controversy." Finding that the Plaintiffs do not have standing, summary judgment in favor of the Defendants is appropriate.

In his claim for declaratory judgment, Judge Graham argues the statute is unconstitutional on its face and as applied. Plaintiff recognizes that the state has a compelling state interest in regulating the conduct of judges, See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978)(Stewart, J., concurring), but claims the statute is not narrowly tailored to serve that interest. Because this Court finds that the statute is narrowly tailored, at least to the extent that it does not prohibit Judge Graham's activities, a discussion of the constitutional claims is not warranted.

"Plaintiffs . . . challenge the State's ability to prohibit the judicial candidates from taking out advertisements to inform the votes about the candidate's unpaid, unsolicited, lawfully-obtained endorsements." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgement, p. 4. The only problem is that §105.071(11) does not prohibit judicial candidates from taking out advertisements containing unpaid, unsolicited endorsements. As long as the candidate sponsors the advertisement, the statute does not prohibit advertisements containing endorsements. The statute does prohibit candidates from paying a third person to take out an advertisement endorsing the candidate. However, because we are not faced with a situation where Judge Graham desires to pay third persons to take out advertisements, 105.071(11) does not prohibit his conduct.

Plaintiffs argue that the postcards they seek to distribute could arguable fall within the statute. This is because they read the statute as prohibiting all advertisements containing endorsements; a reading this Court has determined to be erroneous. The key words in the statute are "sponsored by." If the advertisement is not "sponsored by" a third party then the candidate can pay for the advertisement even if it contains a third party's endorsement. The postcards being mailed may contain the endorsement of a Judge Graham supporter but the postcard is clearly being sponsored by Judge Graham. Judge Graham is the one who had the postcards printed and distributed. The postcards are clearly marked as being a paid political advertisement paid for by Judge Graham. Because the statute does not prohibit a candidate for judicial office from paying for advertisements sponsored by the candidate the postcards are not in violation of the statute even though they contain an endorsement.

The advertisements containing the unsolicited letters of support are not prohibited by the statute because there is no question that Judge Graham is the sponsor of the advertisement. Judge Graham received express written consent from the letters' authors to print the letters in his advertisement. The advertisements are clearly marked "paid for by the campaign account for Gary Graham." The lay-out of the advertisement, Judge Graham's picture and a heading that reads: "FELLOW CITIZENS: Listen to what your neighbors say about Judge Graham," also indicates that Judge Graham is the sponsor of the advertisement. Because the statute does not prohibit a candidate from paying for an advertisement containing an endorsement so long as the advertisement is sponsored by the candidate and not the third

party, Judge Graham is not prohibited from printing unsolicited letters of support in the next election.

Judge Graham claims the Defendants cannot claim the statute does not prohibit his conduct because Mr. King told Judge Graham the conduct in question was a violation of the statute. The opinion of the State Attorney for the Fifth Judicial Circuit is not dispositive of the question. Besides, counsel for the Defendants maintains that Judge Graham will not be prosecuted for a violation of Florida Statutes §105.071(11) if he engages in the exact same conduct at issue in this cause. Defendants' position in this lawsuit would make a subsequent prosecution for these actions subject to a claim of judicial estoppel, the merits of which would have to be decided by the state prosecuting court. See Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1261 (11th Cir. 1988; Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania, 933 F.2d 137, 143 (3rd Cir. 1991)("Having adopted the position in litigation that the [statute] is to be interpreted narrowly, the [Defendants] are barred from returning to court and adopting a contrary position."); Williams v. Kloeppel, 537 So.2d 1033, 1037 (Fla. 1st DCA 1988).

"When a statute or regulation is challenged, it should be interpreted to avoid constitutional difficulties." Stretton, 933 F.2d at 144. A narrow reading of the statute, if reasonable, should be made in order to save the statute from constitutional questions. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). While the statute is not so narrowly written merely to prohibit quid pro quo as the Defendants suggest, is not so expansive to preclude all advertising containing

endorsements as the Plaintiffs suggest. This Court holds that the statute, on its face, prohibits judicial candidates from paying for an advertisement sponsored by a third party and in which that third party endorses the candidate. As Judge Graham does not wish to pay a third party to take out an advertisement endorsing him, the statute does not prohibit the Plaintiffs' conduct. Judge Graham, therefore, is free to engage in his proposed conduct without fear of prosecution.

Accordingly, it is now

ORDERED AND ADJUDGED:

Plaintiffs' Motion for Summary Judgment (docket no. 21) is DENIED.

Defendants' Motion for Summary Judgment (docket no. 19) is GRANTED and this case is DISMISSED.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 6 day of October, 1992.

(signature) John H. Moore
CHIEF UNITED STATES
DISTRICT JUDGE

Copies to:
Nina E. Vinik, Esq.
James K. Green, Esq.
George Lee Waas, Esq.

ORDER OF THE ELEVENTH CIRCUIT DENYING REHEARING

Stamp: FILED
U.S. Court of Appeals
Eleventh Circuit
Jan. 14, 1994
Miguel J. Cortez
Clerk

No. 92-3115

HON. GARY G. GRAHAM and
CHRISTOPHER LITRAS,

Plaintiffs-Appellants

versus

ROBERT A. BUTTERWORTH,
BRADLEY E. KING,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTIONS(S) OF REHEARING EN BANC

Before: FAY, HATCHETT, Circuit Judges and JOHNSON, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

Joseph W. Hatchett (signature)
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

-----O-----

Fla. Stat. 104.43:

104.43. Grand juries; special investigation

The grand jury in any circuit shall, upon the request of any candidate or qualified voter, make a special investigation when it convenes during a campaign preceding any election day to determine whether there is any violation of the provisions of this code,* and shall return indictments when sufficient ground is found.

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* The "code" referenced in the above statute is the election code, which includes § 105.071(11).

Fla. Stat. 105.071.11:

105.071. Candidates for judicial office; limitations on political activity

A candidate for judicial office shall not:

(1) Participate in any partisan political party activities, except that such candidate may register to vote as a member of any political party and may vote in any party primary for candidates for nomination of the party in which he is registered to vote.

(2) Campaign as a member of any political party.

(3) Publicly represent or advertise himself as a member of any political party.

(4) Endorse any candidate.

(5) Make political speeches other than in his own behalf.

(6) Make contributions to political party funds.

(7) Accept contributions from any political party.

(8) Solicit contributions for any political party.

(9) Accept or retain a place on any political party committee.

(10) Make any contribution to any person, group, or organization for its endorsement to judicial office.

(11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group or organization.

(Emphasis provided).

-----O-----

Eleventh Circuit Rule 40-2:

11th Cir. R. 40-2 Time-Extensions. A petition for rehearing must be filed within 21 days of entry of judgment. Judgment is entered on the opinion filing date. No additional time shall be allowed for mailing. Counsel should not request extensions of time except for the most compelling reasons. Printing delays will not be considered sufficient justifications.

Supreme Court, U.S.
FILED
MAY 8 1994
OFFICE OF THE CLERK

(2)

Case No. 93-1618

IN THE

Supreme Court of the United States

October Term, 1993

GARY G. GRAHAM and CHRISTOPHER LITRAS,
Petitioners,

v.

ROBERT A. BUTTERWORTH,
State of Florida Attorney General, and
BRADLEY E. KING,
State Attorney for the Fifth Judicial Circuit,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
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Attorney for Respondents

QUESTIONS PRESENTED

1. Whether the lower courts' decisions that a prosecutorial and judicial determination that a challenged statute does not apply to a judicial candidate's undisputed action are wholly consistent with Supreme Court jurisprudence in extinguishing a case or controversy and mooting the putative First Amendment claim.

2. Whether the Eleventh Circuit's decision that petitioners lack overbreadth standing is consistent with Supreme Court jurisprudence.

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§ 105.071(11), Fla. Stat. . . . . *passim*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition for writ of certiorari establishes that the declaration petitioners seek is not available to them. Despite being told repeatedly that petitioner Graham's activities are not within the scope or coverage of the subject Florida statute, Fla. Stat. § 105.071(11), petitioners continue to press their claim for a declaration that this statute does indeed apply to them and that this law should therefore ultimately be stricken as violative of the First Amendment.

A reading of the two decisions appearing in the Appendix to the Petition for Writ of Certiorari demonstrates that both courts relied on clearly established precedent of this Court in holding that there ultimately was no live case or controversy, petitioners therefore lacked standing, and hence the case was and remains moot.

Moreover, the Eleventh Circuit's decision in the instant cause clearly distinguishes its prior decision in *ACLU v. The Florida Bar,* 999 F.2d 1486 (11th Cir. 1993) and, therefore, there exists no intracircuit conflict because of the determination early on that the statute does not apply to petitioner Graham's undisputed conduct.

STATEMENT OF THE CASE

On March 16, 1992, Graham and Litras filed their lawsuit against Robert Butterworth, State of Florida Attorney General, and Bradley King, state attorney for Florida's Fifth Judicial Circuit, seeking declaratory and injunctive relief against enforcement of Fla.Stat. § 105.071(11). Butterworth and King filed a motion to dismiss, which the district court denied on June 26, 1992. On July 20, 1992, both parties filed cross motions for summary judgment. On October 6, 1992, the district court denied Graham's and Litras's motion for summary judgment and granted Butterworth's and King's

motion for summary judgment, finding that the statute did not proscribe petitioners' intended conduct; thus, no actual threat of injury existed, and therefore, no case or controversy existed and petitioners lacked standing. The Eleventh Circuit Court of Appeals dismissed the appeal, agreeing with the district court that the subject statute did not regulate Graham's conduct, that Graham and Litras lacked standing, and that the action was moot.

The appeals court reached this determination from the undisputed facts as specifically found by the Court which are recited here because of Graham's and Litras's embellishment *de hors* the record.[1]

In 1990, Gary Graham was a candidate for the office of county court judge for Citrus County, Florida, and Christopher Litras, a resident of Citrus County, supported Graham in his campaign. As part of his campaign literature, Graham paid for the printing of 5,000 postcards reading: "I am supporting Judge Graham because: _____." The blank space allowed supporters to insert reasons for supporting Graham. Supporters would then mail the postcards to other voters to inform them of Graham's campaign. Each postcard stated: "Paid for by the campaign account of Gary Graham," denoting that it was a paid political advertisement. Graham, Litras, and other supporters distributed approximately 50 to 100 of these postcards in Citrus County.

During the campaign, Graham also received a number of unsolicited letters from area voters. With the written consent of the voters, Graham paid to have some of their

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1 "After the commencement of this litigation, for the first time, in an obvious attempt to avoid ruling on this constitutional challenge, respondents changed their position concerning the scope of the Florida Statute." Pet. pg. 5. This statement is pure opinion unsupported by the record; respondents based their interpretation on a reading of the statute, and not to avoid litigation.

letters reprinted in local newspapers as part of an advertisement for Graham's candidacy. Each advertisement stated: "Paid for by campaign account for Gary Graham," indicating that it was a paid political advertisement.

During the campaign in August of 1990, Charles Horn, Graham's opponent, publicly accused Graham of violating Florida Statute § 105.071(11). Fla.Stat. § 105.071(11) reads: "A candidate for judicial office shall not:...(11)Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization."

On August 27, 1990, Bradley King, State Attorney for the Fifth Judicial Circuit, which includes Citrus County, informed Graham that the distribution of the postcards and the publication of the letters of support violated the statute. Because the state attorney concluded that Graham did not have the requisite criminal intent to violate the statute, and Graham's opponent did not wish to have the grand jury investigate the incident, the state attorney took no further action.
5 F. 3d at 497-98.

REASONS FOR DENYING THE WRIT

I. The Lower Courts' Decisions That a Prosecutorial and Judicial Determination That a Challenged Statute Does Not Apply to a Judicial Candidate's Undisputed Action Are Wholly Consistent With Supreme Court Jurisprudence in Extinguishing a Case or Controversy and Mooting the Putative First Amendment Claim.

Petitioners' mootness argument is fatally flawed because it is wholly predicated on a faulty premise. Contrary to their protestations, the case *sub judice* does not involve "voluntary

cessation of allegedly illegal conduct" (pet. pg. 7) or an "official's promise to discontinue prosecutorial action" (pet. pg. 9) in the face of a viable prosecution. As demonstrated below, and as a reading of the lower court decisions unquestionably establishes, there is no "allegedly illegal conduct" precisely because the challenged statute does not apply to them. And because of this administrative and judicial determination of nonapplicability, petitioners' fear that the prosecutor can "return to his old ways" (pet. pg. 7) is illusory. Against this backdrop, both the district and appeals court relied on well established Supreme Court jurisprudence in rejecting the claims of Graham and Litras; in light of their claims as shown below, it is they who seek a departure from this Court's precedent.

By their petition, Graham and Litras seek to accomplish the following:

1. To have this Court rule that, in First Amendment actions, a case or controversy exists for all purposes and for all times throughout the litigation, regardless of intervening events, as soon as a prosecutor utters his or her early on belief that intended actions violate the law. In short, Graham and Litras urge this Court to treat as meaningless surplusage all subsequent prosecutorial declarations to the contrary and judicial declarations that the subject statute is inapplicable to them and their intended conduct.

2. To have this Court, based on the early declaration by State Attorney King, declare the statute applicable to

Graham for the express purpose of allowing him to press his (and Litras's) First Amendment claims.[2]

Graham and Litras contend that the Eleventh Circuit's decision establishes a dangerous precedent, immunizing government actions from constitutional scrutiny. Pet. pgs. 6 and 7. However, the lower court opinions clearly establish that there is no government action affecting petitioners that is being immunized; petitioners' actions simply do not implicate, or fall within the scope of, the statute.

In this light, it is the vitalization of their claim that would create a dangerous precedent by jettisoning well-settled federal case or controversy jurisdictional principles. This is so because petitioners want this Court to craft a right for a First Amendment plaintiff to litigate a claim on the merits in federal court solely on the basis of an early on erroneous interpretation of the law regardless of intervening events, including judicial interpretations that a questioned law does not affect petitioners.

This Court's precedent on case or controversy requirements establishes the correctness of the lower courts' opinions, and a reading of both decisions appended to the petition demonstrates without question that both courts relied exclusively on Supreme Court precedent in reaching their conclusions.

In *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937), this Court held that actions cognizable in federal court must involve substantive controversies, requiring action "between parties having adverse legal interests, of

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2 As footnote 2 of their petition makes clear, Graham and Litras continue to press for an interpretation of the subject statute that is contrary to that of the lower courts which, if vitalized, would permit them to maintain their constitutional challenge. See Appendix to Petition for a Writ of Certiorari, pgs. 9a, 16a-19a. As demonstrated in this brief, such an enterprise is not countenanced by our jurisprudence.

sufficient immediacy and reality" to justify granting relief. See also *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Of profound importance for the purpose of the case *sub judice* is that the *controversy must exist at all stages of the litigation. United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950). (Emphasis added.) Such is not the case here.

Both courts below rely on *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979) and *Flast v. Cohen,* 392 U.S. 83, 95, 99-100 (1968) in their respective case or controversy and standing analyses. *Babbitt* instructs that a " 'case or controversy' exists when the conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Id.* It thus necessarily follows that, for a party to have standing to challenge a statute, that challenger must demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Id.*[3]

In light of the fact that King (as well as Butterworth) early on and repeatedly represented that the challenged statute does not apply to Graham's and Litras's proposed conduct, and the lower courts have held that the statute does not apply to their intended activity, it is disingenuous for Graham and Litras to contend before this Court that Graham nevertheless presently fears prosecution under a statute which does not apply to him.

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3 The district court, in addressing case or controversy and standing, also relied on *Railway Mail Ass'n v. Corsi,* 326 U.S. 88, 93 (1945), *Baker v. Carr,* 369 U.S. 286, 204 (1962), *Steffel v. Thompson,* 415 U.S. 452, 458 (1974), *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982), and *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983). The Eleventh Circuit also relied on *Whitmore v. Arkansas,* 495 U.S. 149, 154 (1990) in addressing the standing issue.

As previously shown, the flaw in petitioners' argument is found in their effort to overcome the Eleventh Circuit's mooting of their claim. As Graham and Litras argue, " 'voluntary cessation of allegedly illegal conduct...does not make the case moot,' and 'a dispute over the legality of the challenged practices...may remain to be settled in such circumstances." Pet. pg. 7. What petitioners overlook is that there is no "allegedly illegal conduct" in the case at bar, and a dispute does not exist simply because a party desires one!

A case or controversy no longer existed after King (and Butterworth) represented that Graham's intended conduct was not implicated by the subject statute; neither did a case or controversy exist when the district court held that Graham's actions were outside the scope of the statute. The Eleventh Circuit's disposition of the case—that Graham and Litras had standing at the time the case was filed but not after subsequent events mooted the cause—is supported by this Court's decision in *Powell v. McCormick,* 395 U.S. 486, 496 (1969). Petitioners' view that a case or controversy exists—and they therefore have standing—entitling them to a decision on the merits of their First Amendment claim at the moment a prosecutor utters his or her initial belief as to the meaning and application of a statute, even if thereafter that prosecutor avers that this first blush view was incorrect, flies in the face of the standards this Court has espoused for case or controversy and standing conditions precedent.

The cases cited by Graham and Litras in support of their position involve allegations of illegal conduct, followed by the representation of no prosecution.[4] The absence of any

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4 In *ACLU v. The Florida Bar,* 999 F. 2d 1486 (11th Cir. 1993), it was the representation as to the constitutionality of the challenged provision of the Florida Code of Judicial Conduct which caused the Eleventh Circuit to hold that the possibility of prosecution nevertheless existed. The appeals court thus distinguishes that case with the one *sub judice.* See Pet. App. Pgs. 8a - 9a.

alleged illegal conduct, and multiple declarations that petitioners are outside the statute's embrace, render inapplicable their cited authorities; Graham simply does not face a threat of prosecution for his intended actions, see *Doe v. Bolton,* 410 U.S. 179, 188 (1973), and petitioners' protestations to the contrary simply do not make it so.

The further import of Graham's and Litras's claim is to have this Court depart from two well-settled principles: (1) construing statutes so as to avoid constitutional questions, and (2) not issuing advisory opinions.

The lower courts were faithful to this Court's view that a statute should be interpreted to avoid constitutional difficulty by undertaking a narrow, reasonable reading of the provision. *Osborne v. Ohio,* 495 U.S. 103 (1990); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,* 485 U.S. 568 (1988); and that parties are not permitted to seek advisory opinions from federal courts. *Flast v. Cohen, supra*; see also *Buckley v. Valeo,* 424 U.S. 1 (1976). That Graham and Litras seek an advisory opinion that they may press their claim is most evident by their representation that even if they are not within the scope of the statute, they nevertheless have standing to challenge it on behalf of those who were governed by it. Pet. pg. 16. As the argument below makes clear, their overbreadth standing claim also is without merit.

II. The Eleventh Circuit's Decision that Petitioners Lack Overbreadth Standing is Consistent With Supreme Court Jurisprudence

There are three fallacies in petitioners' final argument. First, their bare claim—that anyone may challenge a statute on First Amendment grounds even if the provision does not affect the challenger—flies in the face of this Court's

admonition in *Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989). In that case, this Court said:

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, *before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.* (Emphasis added).

In the case *sub judice,* there was no "as applied" determination directed to Fla. Stat. § 105.071(11) precisely because petitioners were found to be outside of this provision's coverage. Therefore, the Eleventh Circuit properly refrained from adjudicating an overbreadth claim. Notwithstanding this Court's admonition and the Eleventh Circuit's adherence to it, Graham and Litras nevertheless seek to mount an impermissible "gratuitous wholesale attack() upon" this statute. This they cannot do.

Second, petitioners' overbreadth argument flows from the same flawed premise set out in Part I above; that somehow the prosecutor remains free to change his mind and decide to prosecute. Pet. pg. 15. In light of the statute's clear interpretation, this claim is meritless.

Third, at no time during the litigation did Graham or Litras seek to establish record evidence of the identity of those "persons who were governed by" the provision and adversely impacted by it. An overbreadth claim generally allows a challenger to proceed "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American*

Booksellers, Inc., 484 U.S. 383, 392-93 (1988). The two lower court decisions demonstrate that no such prediction or assumption was or can be made, and there is nothing in the record that implicates the notion "that the statute's very existence may cause others not before the court to refrain from" First Amendment-protected activities.

As these overbreadth cases make clear, there is a difference between declaring that a statute does not apply to a challenger and simply refraining from prosecution under a valid applicable statute. The latter may permit an overbreadth challenge; the former does not, as such a challenge presupposes a prima facie valid First Amendment "as applied" claim. Because, under the facts of this case, there is no such prima facie valid First Amendment claim, petitioners therefore seek an advisory opinion that they are permitted to maintain their challenge to a statute that does not affect either of them, and an advisory opinion on the statute's presumed impact on persons not before the court involving unspecified activity. These are clearly impermissible uses of the federal courts.

Petitioners rail against the Eleventh Circuit's "dangerous precedent" in not favorably ruling on the overbreadth claim. However, the dangerous precedent is the one petitioners seek to establish; that one not affected by the application of a statute nevertheless may press a constitutional overbreadth claim. The adoption of such an approach would wreak havoc with this Court's admonition in *Board of Trustees,* S.U.N.Y., 492 U.S. at 484-85, that courts not permit "wholesale attacks upon state...laws."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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